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MEMORANDUM

TO: Robert E. Simpson, Jr., MPH, DSW, President and Chief Executive Officer
Peter Albert, LICSW, Director of PrimariLink & External Affairs

FROM: Craig Miskovich, Esq., Downs Rachlin Martin PLLC

CC: Peter D. Van Oot, Esq., Downs Rachlin Martin PLLC

DATE: September 21, 2009

RE: Supplemental Hospital within a Hospital Analysis: 04938/00215

I. Introduction

In her September 11, 2009, letter to Robert E. Simpson, Jr., Beth Tanzman, Deputy Commissioner of the Vermont Department of Mental Health ("DMH"), asked that the Brattleboro Retreat (the "Retreat") respond to certain supplemental questions regarding the Retreat's response to the RFP issued by DMH. In his response to Ms. Tanzman, dated September 18, 2009, Mr. Simpson indicated that legal counsel for the Retreat, Downs Rachlin Martin PLLC ("DRM"), would address the following requests contained in Item #4 of Ms. Tanzman's letter:

Please provide a more detailed description of the IMD issue, the alternative approaches to avoid the IMD classification referenced in your proposal, and your analysis of the likelihood that the program would not be classified as an IMD. Please describe your understanding of the implications if the proposed and existing programs were classified as IMDs.

DRM's response to the DMH request incorporates the initial RFP material, including the memorandum from Craig Miskovich of DRM to Wendy Beiner of the Vermont Department of Health, dated July 24, 2009, and attached hereto as Exhibit A (the "July Memo").

II. More Detailed Description of the IMD Issue

Much has been written about the IMD issue. Perhaps none of that writing has been as clear as a paper titled An Analysis of the Medicaid IMD Exclusion by Sara Rosenbaum, Joel Teitelbaum and D. Richard Mauery of the Center for Health Services Research and Policy at the George Washington University of the School of Public Health and Health Services. We have appended the paper to this memorandum as Exhibit B and excerpted certain portions of the paper that are responsive to the above requests.

As referenced in the July Memo, the facility proposal by the Retreat (the “HwH Facility”) will either follow a joint venture model (“Joint Venture Model”) with Brattleboro Memorial Hospital (“BMH”) or a new company model (“Newco Model”) in which a new entity will be created. The guidelines by which the Centers for Medicare & Medicaid Services (“CMS”) will evaluate whether the HwH Facility is an institution for mental diseases are contained in § 4390 of the State Medicaid Manual which is attached hereto as Exhibit C. The first step in CMS’ IMD analysis is to determine if the HwH Facility is an “institution.” CMS poses the following questions in that analysis:

1. Are all components of the facility controlled by one owner or one governing body?
2. Is one chief medical officer responsible for the medical staff activities in all components of the facility?
3. Does one chief executive officer control all administrative activities in all components of the facility?
4. Are any of the components of the facility separately licensed?
5. Are the components of the facility so organizationally and geographically separate that it is not feasible to operate as a single entity?
6. If two or more of the components are participating under the same provider category, can each component meet the conditions of participation independently?

CMS states that if the answer to items 1-3 is “no” or the answer to items 4-6 are “yes,” CMS may conclude that a separate facility exists. While most entities prefer that CMS not making a finding of a separate entity, the Retreat’s HwH Facility will be structured so that the answers to items 1-3 is will be “no” and the answer to items 4-6 will be “yes” so that the HwH Facility will be considered a separate facility from the Brattleboro Retreat which is, of course, an IMD. This initial analysis by CMS is crucial to the Retreat’s proposal because the HwH Facility will have only 16 beds. Because no separate facility with fewer than 17 beds can be deemed an IMD, if CMS’ analysis determines that the facility is independent of the Brattleboro Retreat it cannot be deemed an IMD.

Getting a “no” answer on items 1-3 requires that corporate formalities be clearly delineated and followed. The HwH Facility governance must be separate from the Retreat governance. If the

Joint Venture Model is followed, the components of the HwH Facility will be controlled by BMH, which has its own governing body, medical staff and chief executive officer. If the Newco Model is followed, the Newco will create a new governing body, medical staff and position for a chief executive officer.

While getting a “yes” answer on items 4-6 may be more difficult, the Retreat intends to follow the path of the Carrier Clinic Foundation of New Jersey which recently created a successful HwH facility. DRM will continue to work closely with the Carrier Clinic Foundation’s legal counsel that sheperded the Foundation through the CMS analysis described above. The HwH Facility will seek separate licensure and CoP compliance. If the Joint Venture Model is followed the licensure will be sought through BMH, if the Newco Model is followed the licensure will be separate and independent of the Retreat and BMH.

In response to the final request in Ms. Tanzman’s letter, if the HwH Facility is considered an IMD, inpatient treatment of patients between the ages of 21 to 64 will not be eligible for Medicaid reimbursement unless the state of Vermont pursues an IMD waiver.